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Supreme Court of the United States

October Term 1979

No. 79-41

JOSE GUADALUPE VALENZUELA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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JOSE GUADALUPE VALENZUELA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the United States Supreme Court, October Term 1979:

The Petitioner, Jose Guadalupe Valenzuela, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed April 5, 1979. This case involves issues relating to the constitutionality and sufficiency of instructions with regard

to the continuing criminal enterprise statute (Title 21, United States Code, Section 848). The Petitioner, convicted under that Section, has been sentenced to life imprisonment without possibility of parole.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto as Appendix "A" (Appendix pp. 1 - 15). No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered April 5, 1979, affirming the Petitioner's conviction on nine counts. These included one count of conspiracy pursuant to Title 21, United States Code, Section 846; one count of continuing criminal enterprise pursuant to Title 21, United States Code, Section 848; and seven substantive counts in which the Petitioner was charged as an aider and abettor pursuant to Title 18, United States Code, Section 2. The underlying offenses in the substantive counts were violations of Title 21, United States Code, Section 841(a)(1). A timely petition for rehearing and suggestion for rehearing en banc was denied by Order filed June 6, 1979. A copy of that Order is appended hereto as Appendix "B" (Appendix p. 16). The Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1254(1) and Rule 22(2).

QUESTIONS PRESENTED

1. Whether the proof of various elements of the continuing criminal enterprise count was insufficient, and whether the instructions offered on such elements were inadequate, particularly in light of the failure of the District Court to offer instructions to the jury on some of these elements, and in view of a conflict in the Circuits on the meaning of these terms?

2. Whether the statutory terms used to define the elements of Title 21, United States Code, Section 848, which are nowhere defined within the Statute, are so vague as to deny due process of law, and are thus insufficient to justify both a conviction and the imposition of the maximum sentence of life imprisonment without possibility of parole?

3. Whether the proof before the District Court raised a fatal variance in view of the fact that the government offered substantial particularized evidence regarding the activities of an alleged narcotic organization and conspiracy in which the government admits the Petitioner was not involved?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Five to the United States Constitution provides in part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . . "

Title 18, United States Code, Section 2(a) provides:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Title 21, United States Code, Section 848 provides in part:

"(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than ten years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2) . . . .

"(b) For purposes of Subsection (a) of this Section, a person is engaged in a continuing criminal enterprise if–

"(1) He violates any provision of this Subchapter or Subchapter II of this Chapter, the punishment for which is a felony, and

"(2) Such violation is a part of a continuing series of violations of this Subchapter or Subchapter II of this Chapter–

"(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

"(B) from which such person obtains substantial income or resources.

"(c) In the case of any sentence imposed under this Section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and Section 4202 of Title 18 . . . shall not apply."

Title 18, United States Code, Section 4202 provides in part:

"There is hereby established, as an independent agency in the Department of Justice, a United States Parole Commission which shall be comprised of nine members appointed by the President, by and with the advice and consent of the Senate . . . . "

STATEMENT OF THE CASE

Superseding indictment No. 77-1047(A) was filed in the United States District Court for the Central District of California on September 6, 1977. The indictment was in nine counts. Count One charged a violation of Title 21, United States Code, Section 846 (conspiracy); Counts Two through Eight charged violations of Title 21, United States Code, Section 841(a)(1), and charged the Petitioner pursuant to Title 18, United States Code, Section 2. Count Nine charged a violation of Title 21, United States Code, Section 848 (continuing criminal enterprise). Nine other individuals were charged variously in Counts One through Eight. The Petitioner alone was charged in Count Nine.

The matter proceeded to jury trial beginning on November 2, 1977. Following ten days of jury trial and approximately three and one-half days of deliberation, the jury

returned verdicts of guilty on all counts as to the Petitioner.

On December 19, 1977, the Petitioner was sentenced to fifteen years on each of Counts One through Four, to run consecutively; fifteen years on each of Counts Five through Eight, to run consecutively; life imprisonment pursuant to Count Nine, which was to run concurrent to the sentences imposed on Counts One through Eight. A ten-year special parole term was imposed with regard to Counts One through Eight.

The convictions on all counts were affirmed by an opinion of the United States Court of Appeals for the Ninth Circuit filed April 5, 1979 (Appendix "A"). A timely petition for rehearing was denied, and a suggestion for rehearing en banc rejected, by Order filed June 6, 1979 (Appendix "B").

REASONS FOR GRANTING A WRIT

In 1970 Congress adopted Title 21, United States Code, Section 848, the continuing criminal enterprise section, which carries as a maximum sentence one of the harshest penalties possible, life imprisonment without possibility of parole. That, purportedly, was the sentence imposed upon this Petitioner. The offense proscribed by that Section, which finds no parallel in the common law, is defined through the recitation of several elements described only through the use of terms nowhere defined within the statutory scheme. In the almost nine years since the adoption of the statute no definitive definitions have been provided for many of the terms used. In some cases the various Circuit Courts of Appeals differ as to the

interpretation of particular terms; and in this case, the District Court failed to offer instruction as to the meaning of some of the terms.

This lack of adequate definition of a legislatively created offense is a sufficient basis for the entertainment, by this Court, of the Petition. Providing a definitive interpretation of the language of this most serious offense is essential, both to protect the interests of criminal defendants and the interest of the government in prosecuting and convicting those accused of violating this Section.

This Court's consideration of the issue, however, is heightened against the background of the allegation made in this case, that the terms are not self-defining and are, in fact, so vague as to deny a criminal defendant due process of law. The jury in this case, left to its own devices because of the lack of instruction offered to it, convicted the Petitioner upon each count. It is by no means clear that a properly instructed jury either could or would have rendered such a verdict. If it is Petitioner, or others like him, are to spend the rest of their natural lives incarcerated in a federal institution, they should, at least, be entitled to a definition of their alleged misconduct.

The definition of continuing criminal enterprise is contained in Title 21, United States Code, Section 848(b). Subsection (2) of that Section requires that a finding be made that the defendant committed a violation of the Subchapter as part of a "continuing series of violations of this Subchapter." The statute does not state, however, whether the "series of violations" must be based upon "convictions" or evidence regarding uncharged offenses. *United States v. Michel*, 588 F.2d 986, 1000 n. 15 (5th Cir. 1979). In this

case, the majority of the evidence offered by the government related *not* to the offenses charged but to other alleged narcotics transactions performed between various individuals and government cooperating witnesses. The jury, however, was *not* instructed whether such "other evidence" could be used for proof of the "continuing series of violations of this Subchapter." In fact, it appears that the only violation "of the Subchapter" with which the Petitioner was convicted, other than Section 848, was with regard to Count Eight, where the Petitioner was charged with a violation of Section 841(a)(1). The court below appears to have conceded that the Petitioner was convicted on the substantive offenses *only* as an aider and abettor (Appendix p. 3 n. 2). While a person so charged and convicted may be "punished" as a principal, such a conviction is pursuant to Title 18 and *not* a Subchapter of Title 21. In view of the specific language of Section 848, which requires a series of violations of "this Subchapter," and in view of the need to strictly construe penal statutes in favor of the defendant, the convictions under Title 18 simply cannot be used as proof of the Section 848 offense. The issue is further dramatized in this case since the evidence of the Petitioner's participation in any of the substantive offenses other than that alleged in Count Eight (see Appendix pp. 2 - 4) is non-existent. Although the panel opinion refused to consider the sufficiency of the evidence upon the substantive offenses (Appendix p. 15), the only evidence which existed to tie the Petitioner to these offenses was the fact that one or more of the participants in the offenses were either directly or loosely related to the Petitioner or members of his family. It was the aura of the

"Valenzuela organization," created by and played upon by the government, that worked its way into this case, both before the District Court and in the panel opinion. Thus, both legally and factually, the substantive offenses could not satisfy the requirement of proof of a "continuing series of violations."

Nor, moreover, could the conviction pursuant to Section 846 satisfy this requirement. This Court, in *Jeffers v. United States*, 432 U.S. 137 (1977), determined that Section 846 was a lesser included offense within Section 848. That decision in *Jeffers* had been foreshadowed by the Second Circuit in *United States v. Sperling*, 560 F.2d 1050 (1977), three days prior to this Court's decision in *Jeffers*. The *Jeffers* rationale, moreover, was accepted by the panel below. The Section 846 offense cannot be utilized, therefore, as proof of an element of Section 848, without improperly and illogically bootstrapping the 848 conviction. As a result, the jury below was confronted with, at best, one offense which it could properly consider as a "continuing series of violations." Even the panel opinion below appears to agree that one offense is insufficient to justify a finding of a "series" (Appendix pp. 13 and 14 and notes 6, 7 and 8).

Furthermore, the term "series" is nowhere defined within the Statute. The court below accepted the definition of "series" with which the jury was instructed, as meaning "three or more." Nothing appears, however, in the legislative history or in this Section itself to in any way define the term "series." The "three or more" definition appears to have originated with *United States v. Collier*, 358 F. Supp. 1351 (E.D. Mich. 1973). Although the

decision of the court in *Collier* was later affirmed in *United States v. Collier*, 493 F.2d 327 (6th Cir. 1974), the Circuit Court opinion did not discuss this particular issue. The District Court definition appears to have been generally adopted. See *United States v. Fry*, 413 F. Supp. 1269, 1272 (E.D. Mich. 1976). The District Court opinion in *Collier*, however, cites as authority Webster's Dictionary and *Tarsia v. Nick's Laundry and Linen Supply Company*, 239 Or 562 (1965), a civil case whose applicability and precedential value is clearly suspect. The Webster's Third New International Dictionary (1966) was relied upon by the court below, although that court recognized that "all dictionaries may not precisely specify the number of related, successive events which are necessary to constitute a 'series,' . . . " (Appendix p. 13, notes omitted). Again, no authoritative construction of the Statute has been made by this Court.

The lack of adequate definition within the Statute, and the disparate treatment which the terms have received in the various Circuits, point out not only the need for clarification by this Court but demonstrate, further, the unconstitutional vagueness of Title 21, United States Code, Section 848. *Conally v. General Construction Company*, 269 U.S. 385, 391 (1926). Although the courts which have considered this issue have found the Statute to be sufficiently precise [see cases cited Appendix p. 12], the decisional history of the Statute belies such an interpretation. Thus, the District Court opinion in *Collier*, in rejecting the claim of vagueness concerning the term "substantial income," again relies upon a series of civil or patent law cases. The impropriety of such reliance, in the face of the imposition

of such severe penalties under this Statute, is apparent.

Moreover, it is totally inappropriate for the judiciary to impose a definition upon an otherwise vague term in a penal statute. *L. P. Stewart and Bros. v. Bowles*, 332 U.S. 398, 404 (1944). See also *Toussie v. United States*, 397 U.S. 112 (1970); *Reid v. Covert*, 354 U.S. 1, 38-39 (1957). No court, therefore, is empowered to define the term "series" or any other term in this penal statute, without reference to any legislative history. Such judicial modification offends the notion of separation of powers.

Finally, the basic incongruity of the Statute is demonstrated by this vagueness. For, an individual occupying a position of "supervision" with regard to five other persons is subject to the imposition of a life sentence. Such "supervision," however, in the past has led to a violation of the aiding and abetting statute, under Title 18, United States Code, Section 2. As the government theory in this case makes clear, there is substantial doubt as to the meaning of the term "supervision" as used in Section 848. For, in this case, the government could just as easily have charged, under its theory, the Petitioner's brothers, Manuel and Fernando, with a violation of Section 848. But, then, how many "supervisors" can there be? Could all five individuals in a five-man conspiracy be charged under Section 848? Are not, in fact, all conspirators, who are liable for each other's acts and presumed to know the intent of his co-conspirators, supervisors–one for the other? The Statute, as it stands, admits of no limitation in this regard. And, because of this particular vice of vagueness, the Statute permits the government to sweep within its ambit those persons whom, in the government's sole discretion, it deems

to prosecute as "supervisors." In this case, the record before the District Court demonstrates that the Petitioner's brother Fernando was a fugitive, and, when that fugitive status became known, a superseding indictment was filed, which, only then, charged the Petitioner under Section 848. The government proof below appeared to indicate that, even under the government theory, Fernando was "in charge" of whatever organization existed. Since this one Valenzuela brother had escaped the jurisdiction, the government then, apparently, proceeded to indict a second brother under Section 848. That the government should be given this choice itself points out the impermissible and unconstitutional vagueness of this Statute.

The legal impropriety of the Petitioner's conviction is further heightened by the fact that the evidence produced before the District Court demonstrated proof of at least two alleged conspiracies, and the government conceded, before the Circuit Court, that the Petitioner was clearly not involved in one of those conspiracies. The basic thrust of the government's case before the District Court was that various members of the Valenzuela "family" had agreed to engage in large-scale importation and distribution of heroin. The government assumed throughout, and the jury apparently believed, that various transactions engaged in by members of the Valenzuela "family" and its relatives were part of one over-all conspiracy, simply because of that blood relationship. Much of the evidence thus took the form of proof of various purported transactions between individual family members and separate narcotics distributors.

A great deal of evidence, however, was also introduced concerning the "Gallardo organization." The Gallardos operated in New York, and, under the government theory, at times sent one or more of its members to purchase heroin from the Valenzuelas. Although there was no contention that the Gallardos were in any way related to the Valenzuelas, the government did successfully contend that evidence concerning the Gallardo organization was admissible as proof of a "string" type conspiracy. This occurred although the government attorney, before the Circuit Court, argued that the Gallardo and Valenzuela "organizations" were separate. The tenor of the evidence regarding the Gallardo group showed that it was a complex organization involving at least five main individuals and several "runners." Testimony was introduced regarding sales by that organization on the streets of New York City. The association between the various members of the Gallardo group, the separation of various members from the group, and their later resuming business together were all presented to the jury below. It thus appears that the evidence demonstrated at least one separate conspiracy involving the "Gallardo" co-conspirators, and, in fact, perhaps as many as two, three or four separate conspiracies. The proof, therefore, showed little by way of a "chain" but, rather, resembled the "spoke" conspiracy as condemned in *Kotteakos v. United States,* 328 U.S. 750 (1946).

However, the standard to be applied to such variance is in doubt. The Second and Seventh Circuits appear to have a fairly strict standard. *United States v. Bertolotti,* 529 F.2d 149 (2nd Cir. 1975); *United States v. Miley,* 513 F.2d 1191, 1207 (2nd Cir. 1975); *United States v. Sperling,* 506 F.2d

1323 (2nd Cir. 1974); *United States v. Bastone,* 526 F.2d 971, 979 (1975). Although the Ninth Circuit appears to have taken a similar position regarding the confusion engendered by such large conspiracy trials, the panel opinion below ignores that position. See *United States v. Baxter,* 492 F.2d 150, 158 (9th Cir. 1973).

A wide variety of cases exist in which the finding of variance receives haphazard treatment. A definitive statement by this Court is essential to clarify the appropriate test to be applied. It is important, of course, to the judicial system as a whole, and in particular to this Petitioner, who was "subjected to a deluge of evidence relating to [the conspiracy] in which [he] played no role." *United States v. Lam Lek Chong,* 544 F.2d 58, 67 (2nd Cir. 1976).

CONCLUSION

This Petition presents, primarily, fundamental issues concerning the interpretation and viability of Title 21, United States Code, Section 848, the continuing criminal enterprise offense. The sanctions imposed for violation of that Section include the imposition of life imprisonment without possibility of parole. It is, undoubtedly, the most severe penalty other than death which can be imposed upon a human being. And, yet, the Statute under which such a severe and unique penalty is authorized is subject to the vagaries of interpretation based upon forum which demonstrates its inherent uncertainty.

This Court, therefore, is called upon either to define the Statute definitively or to strike the Statute as unconstitutionally vague, which may be the only appropriate

finding. The importance of this issue to the Petitioner is apparent. Its importance, however, transcends this single case and is certain to affect the administration of justice in a wide variety of cases. The "most potent weapon" in the prosecutor's arsenal, "conspiracy," has now been replaced by "continuing criminal enterprise." Both the government and potential defendants are entitled to know the parameters of its application.

It is therefore respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX "A"

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE GUADALUPE VALENZUELA, Defendant-Appellant.

No. 78-1281.

Appeal from the United States District Court
For the Central District of California

[Filed April 5, 1979]

Before: WALLACE and HUG, Circuit Judges, and EAST,* District Judge.

EAST, District Judge:

Jose Guadalupe Valenzuela (Jose) appeals his judgment of conviction and sentence to custody entered by the District Court on December 19, 1977 for violation of 21 U.S.C. § 846 (conspiracy), seven counts of violations under 21 U.S.C. § 841(a)(1) (trafficking in heroin), and for violation of 21 U.S.C. § 848 (continuing criminal enterprise).[1] We affirm.

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

[1] Section 848(c) authorizes the imposition of life imprisonment without possibility of suspension of sentence, probation or parole.

Background Facts:

The factual record reveals that the United States Drug Enforcement Administration conducted a long term national and international investigation to neutralize the so-called Valenzuela family organization, one of the major sources of Mexican heroin in the United States. The Valenzuela organization was responsible for the importation of vast quantities of heroin which were distributed to customers from Los Angeles, New York, and other cities. The organization was controlled and directed by Jose and his fugitive brother Fernando Valenzuela (Fernando).

A characteristic of the Valenzuela organization was the use of family members, related by blood or marriage, in the heroin distribution enterprise. A second characteristic of the organization was that it would provide bail to permit members who had been apprehended on heroin charges to flee and thereby avoid prosecution.

The Government offered the testimony of 55 witnesses, including five informants, and introduced more than 100 documentary exhibits and approximately 144 pounds of heroin. The evidence centered on ten different seizures of heroin made from members of the organization from 1973 through 1977. In addition, there was abundant evidence of the great wealth realized by Jose from trafficking in heroin.

First Superseding Indictment:

Jose was indicted along with nine family co-defendants and a number of unindicted family members as follows:

Count 1 charged the defendants Jose, Fernando,

Manuel Valenzuela (Manuel), Nicolasa Valenzuela (Nicolasa), Alleen Seja Valenzuela (Alleen), Mary Elizabeth Corley (Mary), Edgar Estephen (Edgar), Alonso Lizarraga (Alonso), Bernardina Lizarraga (Bernardina), Sergio Mendoza Rodriquez (Sergio), and 22 unindicted family members with conspiracy to commit offenses against the United States (§ 846 and § 841(a)(1));

Count 2 charged two unindicted family members with heroin trafficking (ten ounces) and the defendants Jose and Fernando as aiders and abettors thereto (§ 841(a)(1) and 18 U.S.C. § 2);[2]

Count 3 charged one unindicted family member and defendant Manuel with heroin trafficking (six ounces) and the defendant Jose as an aider and abettor thereto (§ 841(a)(1) and § 2);

Count 4 charged three unindicted family members with heroin trafficking (2.2 pounds) and the defendants Jose and Fernando as aiders and abettors thereto (§ 841(a)(1) and § 2);

Count 5 charged two unindicted family members

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[2]Jose obliquely claims he cannot be charged as an aider and abettor to an unindicted principal charged with commission of a crime. The claim is meritless. *Feldstein v. United States*, 429 F.2d 1092, 1095 (9th Cir. 1970), cited in *United States v. Bryan*, 483 F.2d 88, 93 (3d Cir. 1973). 18 U.S.C. § 2(a) provides:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

and the defendant Alleen with heroin trafficking (4.4 pounds) and the defendants Jose and Fernando as aiders and abettors thereto (§ 841(a)(1) and § 2);

Count 6 charged four unindicted family members with heroin trafficking (44 pounds) and the defendants Jose and Fernando as aiders and abettors thereto (§ 841(a)(1) and § 2);

Count 7 charged two unindicted family members with heroin trafficking (44 pounds) and the defendants Jose and Fernando as aiders and abettors thereto (§ 841(a)(1) and § 2);

Count 8 charged the defendants Jose, Mary, Edgar, Alonso, Bernardina, and Sergio with heroin trafficking (four pounds) (§ 841(a)(1)); and

Count 9 charged Jose, in concert with at least five other persons with whom Jose acted as organizer, supervisor, and manager, with a continuing series of violations, obtaining therefrom substantial income and resources as alleged in Counts 1 through 8 (§ 848).

Jury Verdicts And Sentence:

The jury found the following defendants guilty on all counts as respectively charged:

Jose (Counts 1 through 9);

Manuel (Counts 1 and 3);
Mary (Counts 1 and 8);
Bernardina (Counts 1 and 8);
Alonso (Counts 1 and 8);
Alleen (Counts 1 and 5); and
Nicolasa (Count 1).

Jose was sentenced to 15 years imprisonment on each of Counts 1 through 8 and to life imprisonment on Count 9. The sentences on Counts 1 through 4 were imposed consecutively (total 60 years), and the sentences on Counts 5 through 8 were also imposed consecutively (also 60 years). The two 60-year terms were imposed to run *concurrently* with the term of life imprisonment. The life sentence, pursuant to § 848(c), is without possibility of suspension of sentence, probation or parole.

Appeal Of The Defendants:

All of the convicted defendants, except Alleen and Nicolasa, have appealed. The appeals of Manuel, Alonso, Bernardina, and Mary are treated in a separate opinion by this Court entered in *United States v. Valenzuela*, Nos. 78-1684, 78-1016, 78-1342 and 78-1784, on ..... , 1979, ... F.2d ..... (9th Cir. 1979).

Issues:

Jose presents six specific issues on review, of which we deem the following three to be dispositive of this appeal:

1. Whether the offenses charged in Counts 1 through 8 of the indictment merge in the conviction on Count 9, re-

quiring that the judgments and sentences entered thereon be vacated and that the matter be remanded for resentencing.

2. Whether the search warrant executed August 9, 1977 at 736 Helmsdale Avenue, Valinda, California was constitutionally insufficient and was improperly executed, and whether the officers' entry into the adjoining garage was improper under California law.

3. Whether the provisions of § 848 are void as unconstitutionally vague or ambiguous.

Discussion:

Issue 1:

Jose relies on *Jeffers v. United States*, 432 U.S. 137 (1977), for the proposition that both his Count 1 § 846 conspiracy charge and his Counts 2 through 8 § 841(a)(1) substantive charges are lesser included offenses of his Count 9 § 848 continuing criminal enterprise charge. Accordingly, he argues that the convictions on the lesser charges merge into the § 848 conviction and that the case must be remanded for resentencing because he was sentenced to custody on each of those counts.

Jeffers was convicted for violations of § 846 and § 848, and the District Court levied monetary fines upon each of those convictions. The aggregate of the monetary fines of each of those two convictions exceeded the maximum amount of a permissible fine under § 848. In *Jeffers*, the Supreme Court opined at 155:

> "The first issue to be considered is whether Congress intended to allow cumulative punishment for violations of §§ 846 and 848. We have concluded that it did not . . . . "

Thereupon the cumulative monetary fines were reduced to the extent that the same exceeded the maximum fine permissible under the criminal enterprise statute.

In Jose's case, the sentences imposed on his convictions of the conspiracy and substantive charges were made concurrent with his life sentence on the criminal enterprise conviction. Jose's resentencing argument is without merit due to the absence of any excessive cumulative punishment effect. See *United States v. Davis*, 548 F.2d 840, 845 (9th Cir. 1977). The imposition of concurrent sentences does not affect Jose's chances of parole, *cf. Audett v. United States*, 265 F.2d 837, 848 (9th Cir. 1959), because the life sentence under the continuing criminal enterprise section is not subject to parole. Section 848(c). See also *Bradley v. United States*, 410 U.S. 605, 611 (1973); *O'Neal v. United States*, 332 F.2d 152, 153-54 (9th Cir. 1964), and *United States v. Gudino*, 432 F.2d 433, 434 (9th Cir. 1970). In *Jeffers*, Justice Blackmun restricted his discussion to the imposition of cumulative monetary fines. In fact, while *consecutive* prison sentences had been imposed for the conspiracy and criminal enterprise convictions, Justice Blackmun specifically noted that the consecutive sentences did not raise the cumulative punishment issue as the monetary fines did because of the unavailability of parole under the criminal enterprise statute. 432 U.S. at 155, n. 24.

Jose further contends that the Count 1 conspiracy charge is a lesser included offense of the Count 9, § 848, charge, and, therefore, may not be considered as a violation for the purposes of § 848. However, since the jury found

Jose guilty as charged on all nine counts, we may disregard the jury's possible consideration of the Count 1 conspiracy charge in finding a continuing series of three or more violations on the part of Jose, as required by § 848.

Since we ultimately conclude that Jose's judgment of conviction under Count 9 and sentence to life custody is valid, we have no need to inquire into the propriety of other lesser or equal concurrent sentences since Jose's prison term under Count 9 will remain the same whatever the resolution of the other sentences might be. *United States v. Walls,* 577 F.2d 690, 699 (9th Cir. 1978), *cert. denied,* 47 U.S.L.W. 3246 (U.S. Oct. 10, 1978). See also *United States v. Thomas,* 586 F.2d 123, 131 (9th Cir. 1978).

Issue 2:

This Court upheld the validity of the search warrant and the officer's entry thereunder into the Helmsdale residence while dealing with Bernardina's appeal. *United States v. Valenzuela,* ..... F.2d at ..... . However, Jose's issue presents a somewhat more difficult problem because the officer making the entry apparently announced himself just as he entered the open outside door to the garage. Prior to his entry, he observed the occupants in the garage "cutting" a brown powder which appeared to be heroin. This led him to draw his gun and badge, enter the garage while simultaneously announcing his authority, and place Jose and the other occupants under arrest. A subsequent search of the garage produced heroin, a common "cutting" drug, and other drug paraphernalia. Jose contends that under California law, the officer's failure to knock at the open garage door and his

entry contemporaneously with announcement subjected all subsequent observations and seizures to suppression.

Under the federal statute, this entry would be proper for two reasons. First, we have held that entry through an open door is not a "breaking" within the meaning of the statute. *United States v. Scharf,* 421 F.2d 1239, 1240 (9th Cir. 1970); *Reyes v. United States,* 417 F.2d 916, 919 (9th Cir. 1969); *Ng Pui Yu v. United States,* 352 F.2d 626, 632 (9th Cir. 1965). Second, the garage entry was made only after the proper entry at the residence, and "officers are not required to announce at *every* place of entry; one proper announcement under [18 U.S.C.] section 3109 is sufficient." *United States v. Bustamante-Gamez,* 488 F.2d 4 at 10 (9th Cir. 1973), *cert. denied,* 416 U.S. 970 (1974), (emphasis in original) (unannounced entry at garage held proper because made simultaneously with proper entry at front door). The fact that the garage entry was through an open door subsequent to a proper entry at another door also leads us to find that the garage entry was constitutionally reasonable.[3]

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[3]The view that certain knock-notice requirements are incorporated into the Fourth Amendment is partially supported by the fact that "[t]he roots of section 3109, commonly referred to as the 'rule of announcement,' extend well back in the history of Anglo-American jurisprudence." *United States v. Bustamante-Gamez,* 488 F.2d at 9 (footnote omitted). But the Supreme Court, while observing that this rule is "deeply rooted in our heritage and should not be given grudging application," *Miller v. United States,* 357 U.S. 301, 313 (1958), has at the same time apparently recognized that the rule did not extend to open doors at common law:

> "Whatever the circumstances under which breaking a door to arrest for felony might be lawful, however, the breaking was unlawful where the officer failed first to state his authority and purpose for demanding admission. The requirement was pronounced in 1603 in *Semayne's Case,* 5 Co. Rep. 91a, 11 E.R.C. 629, 77 Eng. Repr. 194, at 195: 'In all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make*

California law is more problematic because the state statutes have been held applicable to open outer doors in some, if not all, circumstances. See *People v. Bradley*, 1 Cal. 3d 80, 87-88, 81 Cal. Rptr. 457, 460-62, 460 P.2d 129, 132-34 (1969); *People v. Castenada*, 58 Cal. App. 3d 165, 170, 129 Cal. Rptr. 755, 757 (1976). *People v. Beamon*, 268 Cal. App. 2d 61, 65, 73 Cal. Rptr. 604, 607 (1968).[4] We cannot liken this entry through the open outside door of the garage to an entry through an open inside bedroom door, to which the California statute has been held inapplicable. See *Castenada*, 58 Cal. App. 3d at 170, 129 Cal. Rptr. at 757; *People v. Livermore*, 30 Cal. App. 3d 1073, 106 Cal. Rptr. 822 (1973). *People v. Bruce*, 49 Cal. App. 3d 580, 587, 122 Cal. Rptr. 648,

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(3 cont'd)
request to open doors . . . . ' (Emphasis supplied.)

"The requirement stated in *Semayne's Case* still obtains. It is reflected in 18 U.S.C. § 3109 [and] in the statutes of a large number of States . . . . "

Id. at 308 (footnote omitted, emphasis in original). In *Ng Pui Yu v. United States*, 352 F.2d at 632, we relied in part upon this passage to hold that entry through an open door was not within 18 U.S.C. § 3109.

It is a simple matter for the occupant of a dwelling to close the door, and thus prevent unannounced entry in violation of his or her reasonable expectation of privacy. In view of this fact, and in view of the common law history of the rule of announcement, we cannot hold that in ordinary circumstances an unannounced but otherwise proper entry through an open door is unreasonable.

It should also be pointed out that we reached our holding in *Bustamante-Gamez*, that "officers are not required to announce at *every* place of entry," 488 F.2d at 10 (emphasis in original), only after stating our awareness of the constitutional concerns involved.

[4] In *People v. Bradley*, the California Court also apparently recognized that the common law did not require announcement prior to entry through open doors. See 1 Cal. 3d at 86, 81 Cal. Rptr. at 460, 460 P.2d at 132, quoting *Semayne's Case*, note 3. However, the Court went on to hold that the California arrest-entry statute, Cal. Penal Code § 844, should be construed to apply to open outer doors in some circumstances "[e]ven if at common law an unannounced intrusion through an open door was lawful." 1 Cal. 3d at 87, 81 Cal. Rptr. at 461, 460 P.2d at 133.

652 (1975), is distinguishable because the entry there was through a closed outside door of a detached garage located on occupied residential property.

We conclude that the garage entry was proper under California law because it is clear that the officer entered not only to execute the warrant, but to arrest the persons inside. The California courts have held that the arrest entry statute, Cal. Penal Code § 844, does not apply where an officer perceives, through an open door, an occupant actually engaged in the commission of a narcotic offense in his immediate presence. See *People v. Baldwin*, 62 Cal. App. 3d 727, 740, 133 Cal. Rptr. 427, 438 (1976); *People v. Glasspoole*, 48 Cal. App. 3d 668, 674, 121 Cal. Rptr. 736, 739-40 (1975); *People v. Peterson*, 9 Cal. App. 3d 627, 632-33, 88 Cal. Rptr. 597, 599-601 (1970); *People v. Boone*, 2 Cal. App. 3d 66, 68-69, 82 Cal. Rptr. 398, 399-400 (1969). Here, because of the search warrant, the officer had a right to be near the wide open garage door. His observations through the open door prior to his entry would permit him reasonably to believe that he was observing the commission of a narcotics offense. We find his testimony adequate to show that he in fact formed such a reasonable belief, and thus that the entry was proper.

Issue 3:

Section 848 is the continuing criminal enterprise section of the Comprehensive Drug Abuse, Prevention and Control Act (Act). Jose contends that the language of that statutory provision is unconstitutionally vague and cannot provide the basis for a criminal conviction.

The Second, Fifth, Sixth and Eighth Circuits have each upheld the Section's constitutionality under an attack of vagueness. *United States v. Sperling*, 506 F.2d 1323, 1343 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 and 421 U.S. 949 (1975); *United States v. Sisca*, 503 F.2d 1337, 1345 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States v. Manfredi*, 488 F.2d 588, 602-03 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Cravero*, 545 F.2d 406, 410-11 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); *United States v. Collier*, 493 F.2d 327, 329 (6th Cir.), *cert. denied*, 419 U.S. 831 (1974); and *United States v. Kirk*, 534 F.2d 1262, 1277-78 (8th Cir. 1976), *cert. denied*, 433 U.S. 907 (1977). We subscribe to and join in the respective rationales of those authorities.

Jose contends that § 848 is patently and facially invalid and that the above-mentioned authorities have not properly distinguished between the facial validity of § 848 and its constitutionality as applied to the facts of a particular case. We disagree. Jose's premise ignores the settled principle that "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975). This principle was applied in *Kirk* at 1277, and we further explicate the analysis applied there.

The due process requirement of definiteness is violated by a criminal statute that fails to provide adequate notice to a person of ordinary intelligence that his or her contemplated conduct is unlawful. *Jordan v. DeGeorge*, 341 U.S. 223, 231-32 (1951). See also, *e.g.*, *Papachristou v. Jacksonville*, 405 U.S. 156 (1972).

Jose constructs his vagueness claim around a series of

phrases extracted from the language of § 848. He submits that the phrases "continuing series of violations," "undertaken . . . in concert," "organizer, a supervisory position, or any other position of management," and "substantial income or resources" are too indefinite to provide the basis for his conviction under Count 9. The difficulty we perceive in such an argument is that these phrases cannot properly be considered in the abstract. They draw meaning both from each other and from their larger statutory context.

The phrase "undertaken . . . in concert" has already received the attention of the Supreme Court. In *Jeffers*, 432 U.S. at 148-49, the Court indicated that "[i]n the absence of any indication from the legislative history or elsewhere to the contrary, the . . . likely explanation is that Congress intended the word 'concert' to have its common meaning of agreement in a design or plan."[5] While the *Jeffers* Court was not faced with a vagueness claim, its observation is relevant here. We believe that the phrase "undertaken . . . in concert" is sufficiently precise to notify a person of ordinary intelligence that any agreement in a plan or design to accomplish acts prohibited by the Act would fall within the language of § 848.

We also think that the remaining contested phrases extracted from § 848 are sufficiently definite to satisfy due process strictures. Thus, while all dictionaries[6] may not precisely specify the number of related, successive events which are necessary to constitute a "series,"[7] we think the District

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[5] See 432 U.S. 148 n. 14.

[6] See, *e.g.*, The Random House College Dictionary (Rev. Ed. 1975).

[7] Jose's vagueness contention with respect to the phrase "continuing series of violations" focuses on the purported ambiguity of the word "series."

Court's instruction that a series must consist of three or more federal narcotic law violations was squarely based on common usage. And, as was noted in *United States v. Collier*, 358 F. Supp. 1351, 1355 (E.D.Mich. 1973), *aff'd*, 493 F.2d 327 (6th Cir.), *cert. denied*, 419 U.S. 831 (1974), the definition of "series" contained in Webster's Third New International Dictionary (1966) reflects this usage.[8]

Similarly, the words encompassed within the phrase "organizer, a supervisory position, or any other position of management" enjoy a wide currency in the business community and are commonly understood by members of the general public. In enacting § 848, Congress was clearly concerned with large-scale profit-making enterprises engaged in the illegal importation, manufacture and distribution of controlled substances. The language under consideration was clearly chosen to distinguish minor enterprise "employees" from those who conceive and coordinate enterprise activities.

Finally, we see no fatal vagueness problem in the requirement that a criminal enterprise defendant must have received "substantial income or resources" from his or her activity. The criminal enterprise statute would have been valid even if Congress had omitted such a financial limitation. We see no reason to strike down the statute because Congress has chosen to provide some measure of protection to petty criminal enterprise defendants in this regard.

Therefore, Jose cannot reasonably contend that he was

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[8] The fact that some question may exist as to whether a series could include just two events is of no solace to Jose. *United States v. Mazurie*, 419 U.S. 544 (1975).

not sufficiently notified of the illegality of his conduct as proscribed by § 848.

The evidentiary record here is replete with relevant evidence to support the jury's findings that Jose violated those clearly worded and commonly known specific acts and conduct as proscribed by § 848, and to support the jury's verdict of Jose's guilt beyond a reasonable doubt under Count 9.

Jose's remaining three issues of a lack of evidence to support the jury's verdict of his guilt under Counts 1, 2, 3, 4, 5, and 6, fatal variance in the proof, and lack of appropriate instructions to the jury are each without merit.

The judgment of conviction and sentence to custody entered by the District Court is affirmed.

AFFIRMED.

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ORDER DENYING REHEARING

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOSE GUADALUPE VALENZUELA, Defendant-Appellant.

No. 78-1281.

[Filed June 6, 1979]

Before: WALLACE and HUG, Circuit Judges, and EAST,* District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable William G. East, United States District Judge, District of Oregon, sitting by designation.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on JULY 5th, 1979, I served the within PETITION FOR WRIT OF CERTIORARI (JOSE GUADALUPE VALENZUELA vs. UNITED STATES OF AMERICA) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 10530 (3 copies)

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012 (2 Copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JULY 5th, 1979, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main Street, Huntington Beach, Ca.
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